NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL

MEMORANDUM OM 08-29(CH) February 15, 2008

To: All Regional Directors, Officers-in-Charge, and Resident Officers

From: Richard A. Siegel, Associate General Counsel

Subject: Case Handling Instructions for Cases involving Oil Capitol Sheet Metal, 349 NLRB No. 118 (May 31, 2007)

This memorandum sets forth instructions and guidance to Regions for investigating and litigating compliance issues under Oil Capitol Sheet Metal, 349 NLRB No. 118 (May 31, 2007), reconsideration denied November 15, 2007, petition for review pending (D.C. Cir). The Oil Capitol framework applies to all compliance investigations and litigation concerning salting discriminatees, including refusal-to-hire, unlawful discharge, and unlawful layoff cases.[1] These instructions supersede all prior directives to Regions about investigating and litigating cases under Oil Capitol.[2]

I. Introduction

Under established Board law for determining backpay, it is presumed that discriminatees in the construction industry, like discriminatees elsewhere, would have continued indefinitely in the respondent's employ. A respondent could challenge a backpay period by proving that the employee would have left the job before completion of the project or, under Dean General Contractors,[3] the respondent could rebut the presumption of continued employment by proving that it would not have transferred or

[1] See Oil Capitol, 349 NLRB No. 118, slip op. at 2.

[2] Accordingly, this memorandum supersedes prior directives to hold in abeyance compliance cases implicating Oil Capitol. Regions should resume their compliance investigations consistent with normal practices and the directives set out here.

[3] 285 NLRB 573, 574, 575 (1987).

reassigned the discriminatee after completion of the project at issue.

The presumption of continued employment set forth in Dean General applied to all discriminatees in the construction industry, salts and nonsalts, alike.[4] In Oil Capitol, the Board overruled the application of the Dean General presumption to salting discriminatees and held that the General Counsel must now affirmatively prove that salting discriminatees would have worked the entire backpay period alleged in the compliance specification. Thus, Oil Capitol shifts the burden of proving the duration of a salting discriminatee's backpay period to the General Counsel. This shift will significantly affect the General Counsel's investigation and litigation of such cases. It may also implicate backpay and instatement issues in cases involving older violations that have been in litigation for some time. For instance, a salting discriminatee's right to instatement is defeasible if the General Counsel fails to carry his burden of proving that the discriminatee would still be employed but for the employer's discrimination.[5]

This memorandum explains the General Counsel's new burden of proof under Oil Capitol and the kind of evidence that the Board will consider relevant in sustaining that burden. In addition, this memorandum discusses issues that may occur in compliance cases arising out of unfair labor practices that occurred and were litigated before Oil Capitol.

Submissions to Washington

1. Division of Advice

As a general rule, as discussed more fully below, cases raising questions under Oil Capitol not resolved by this Memorandum should be submitted for Advice.

2. Contempt and Compliance Litigation Branch

Compliance cases with court-enforced Board reinstatement/instatement orders should also be submitted to CLCB pursuant to outstanding instructions. See, NLRB Casehandling Manual (Part Three – Compliance Proceedings) Secs. 10530.7 and 10646.6 (2006).

Specifically, in compliance cases with court-enforced Board orders involving reinstatement/instatement of salts,

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[4] See, e.g., Ferguson Electric, 330 NLRB 514 (2000), enfd. 242 F.3d 426 (2d Cir. 2001).

[5] See Oil Capitol, 349 NLRB No. 118, slip op. at 7 & 7 n.28.

where work is currently available that a discriminatee is qualified to perform, it is important to quickly investigate any respondent claims that events subsequent to the discriminatory action have relieved the respondent of its reinstatement/instatement obligation. Thus, if the respondent claims that reinstatement/instatement is not warranted because, even absent discrimination, the discriminatee would have previously left the respondent's employ, the Region should promptly investigate that assertion by obtaining the parties' position on respondent's claim that instatement/reinstatement is not warranted.[6] After obtaining this information the Region should consult with CLCB telephonically regarding whether contempt proceedings are warranted. If the evidence clearly shows an insufficient basis for initiating contempt proceedings, telephonic consultation with the CLCB suffices. Compliance Manual Section 10530.7. Otherwise, the Region will be instructed to complete its investigation and submit the matter to CLCB (with a copy to the Division of Operations-Management and Advice) with a recommendation as to whether contempt proceedings are warranted.

II. Evidentiary issues in Oil Capitol and burdens of proof

As noted above, the Board in Oil Capitol rejected the presumption of continued employment for salting discriminatees and announced a rule requiring the General Counsel to produce affirmative evidence that discriminatees would have worked for a respondent for the backpay periods claimed in the compliance specification. In its decision, the Board detailed the kind of evidence required to meet this new burden of proof.

A. Who is a salt

Investigation of unfair labor practice charges, particularly in the construction industry, may suggest that an alleged discriminatee is a salt. Respondents bear the burden of proving whether a discriminatee is a salt.[7] Regions should, at the beginning of an unfair labor practice investigation, inquire whether the respondent claims the alleged discriminatees are salts. If so, or if

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[6] In post-judgment cases, Regions are encouraged to consult with the CLCB telephonically, prior to initiating the investigation of such matters, in order to discuss the nature and extent of the investigation to be undertaken. Telephonic inquiries regarding these matters should be directed to CLCB Branch Chief Stan Zirkin or Deputy Branch Chief Ken Shapiro.

[7] See id., 349 NLRB No. 118, slip op. at 2 n.6.

the evidence otherwise suggests that they are, the Region should investigate and determine the issue. An early determination of this issue will focus the Region on the nature of the evidence it needs to gather if Oil Capitol is applicable to the case.

If the unfair labor practices have already been litigated but the salting status of a discriminatee was not litigated or determined, the Region should include this issue in its compliance investigation. If unresolved issues arise regarding whether a discriminatee is a salt, Regions should submit them to Advice.

In Oil Capitol, the Board broadly defined salts as, "those individuals, paid or unpaid, who apply for work with a nonunion employer in furtherance of a salting campaign" and who are subject to the union's disciplinary control.[8] "Salting," in turn, is defined by the Board as "the act of a trade union in sending in a union member or members to an unorganized jobsite to obtain employment and then organize the employees."[9] The Board further noted that a salting campaign's "immediate objective may not always be organizational," citing cases in which the salts' objective was to precipitate unfair labor practices, thus weakening targeted employers.[10]

B. Proving a salting discriminatee's applicable backpay period and right to instatement

In cases involving salting discriminatees, the General Counsel must present affirmative evidence that the discriminatee, if hired, would have worked for the respondent during the entire backpay period.[11] In most backpay cases, this new evidentiary rule will raise two issues: (1) whether the salting discriminatee would have worked for the respondent for the entire duration of the project in question; and (2) whether, and for how long after the project's end, the discriminatee would have

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[8] Id., slip op. at 1 n.5, 2 n.6.

[9] Id., slip op. at 1 n.5, quoting Tualatin Electric, 312 NLRB 129, 130 n.3 (1993), enfd. 84 F.3d 1202, 1203 n.1 (9th Cir. 1996).

[10] See Oil Capitol, 349 NLRB No. 118, slip op. at 1 n.5, citing Hartman Bros. Heating & Air Conditioning v. NLRB, 280 F.3d 1110, 1112 (7th Cir. 2002); Starcom, Inc., v. NLRB, 176 F.3d 948, 949 (7th Cir. 1999).

[11] See Oil Capitol, 349 NLRB No. 118, slip op. at 2.

worked for the respondent by accepting a transfer(s) to other respondent jobs.[12] Regions should note that with regard to (2), evidence that a respondent's practice is to transfer employees from jobsite to jobsite is not itself sufficient to establish that the salt would have continued to work for the respondent; the General Counsel must present affirmative evidence that the discriminatee would have indeed accepted the transfer.[13] As noted above, a discriminatee's right to instatement is dependent on the General Counsel's ability to prove that the discriminatee would still be employed by the respondent but for the discrimination.[14]

The Board in Oil Capitol specified the following factors as relevant to proving the length of a salting discriminatee's backpay period: (1) the discriminatee's personal circumstances during the backpay period; (2) contemporaneous union policies and practices with respect to other salting campaigns at the time of the discrimination; (3) specific union plans for the targeted employer; (4) instructions or agreements between the discriminatees and the union concerning the anticipated duration of the assignment; and (5) historical data regarding the duration of employment of the discriminatees and other discriminatees in similar organizing campaigns by the same union.[15] While this list is not exhaustive, Regions should focus on these factors when investigating compliance issues involving salting discriminatees.[16]

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[12] See id.

[13] Id.

[14] Thus, a Board order of instatement is defeasible as of the date the backpay period ends. See id., slip op. at 7 & 7 n.28.

[15] See id., slip op. at 2, 5.

[16] See id., slip op. at 2. Regions should note that Toering Electric Co., 351 NLRB No. 18 (September 29, 2007), in which the Board imposed on the General Counsel the burden of proving that discriminatees in refusal to hire cases are bona fide applicants, affects the litigation of unfair labor practice liability in those cases and not compliance issues under Oil Capitol. The General Counsel will issue separate guidelines concerning the new burden of proof in refusal to hire cases under Toering.

III. Application of Oil Capitol to unfair labor practice and compliance cases

Application of Oil Capitol must be considered in all new and ongoing unfair labor practice and compliance cases where the alleged discriminatee is a salt. The following discussion will identify the kind of evidence Regions need to gather during ongoing unfair labor practice and compliance investigations in which Oil Capitol will apply prospectively. In addition, the discussion will identify if, when, and how, Regions should argue that Oil Capitol should not be applied retroactively because it will result in a manifest injustice.

A. Prospective application of Oil Capitol to new charges

When Regions find merit to unfair labor practice charges involving salting discriminatees, they should identify for the union and/or salting discriminatee the evidence needed to sustain the General Counsel's Oil Capitol burden during a subsequent compliance hearing or settlement discussions and should notify them of the potential need to produce such evidence in the future.

Since the issuance of Oil Capitol, the General Counsel has successfully carried his new evidentiary burden before an ALJ in a compliance hearing in which the unfair labor practices triggering commencement of the backpay period had occurred less than two years earlier. In Jeffs Electric, the General Counsel successfully proved the five-month backpay period alleged in the compliance specification.[17] Pursuant to Oil Capitol, the General Counsel produced affirmative evidence of the six discriminatees' personal circumstances during the backpay period, e.g., when they began working for respondent, they were unemployed, in the bottom-half of the union's out-of-work list, and were not expected to be referred to a union contractor for at least six months because of severe unemployment at the time.[18] The General Counsel also adduced evidence of the union's salting practices, such as the fact that it conducted similar organizing campaigns in the same geographical area, including one in which a discriminatee worked for six

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[17] JD(NY)-41-07 (September 17, 2007). No exceptions were filed to the ALJ's supplemental decision and recommended order on backpay, which the Board subsequently adopted on November 1, 2007.

[18] JD(NY)-41-07, slip op. at 8. See also Oil Capitol, 349 NLRB No. 118, slip op. at 2.

months before the union abandoned the campaign. A union official also testified that he believed that the organizing campaign would last at least six months and he requested and received a commitment from each discriminatee that he would work for respondent for the duration of the campaign, through an election or contract, or until the union abandoned the campaign. Finally, the union's intent to maintain a sustained campaign was established by its filing a petition with the Board and winning a representation election.[19]

B. Mitigation Issues

In Contractor Services, 351 NLRB No. 4 (September 27, 2007) the Board held that a paid union organizer failed to properly mitigate his loss of earnings during the backpay period by limiting his job search to nonunion employers.[20] The General Counsel has filed with the Board a motion for reconsideration of this decision as well as the Board's decision to retroactively apply Oil Capitol to another discriminatee's backpay period. It is unclear the extent to which Contractor Services changed prior Board law regarding a salt's mitigation efforts.[21] Thus, Regions should continue to litigate salting discriminatees' backpay earnings under applicable Board law prior to Contractor Services until the Board acts on the General Counsel's motion for reconsideration of that decision.

C. Retroactive application of Oil Capitol to pending cases

Initially, if a Region determines that Oil Capitol applies to a case in which the unfair labor practices have already been litigated, it should first evaluate the administrative record in the unfair labor practice litigation to determine whether there already exists evidence to sustain the General Counsel's Oil Capitol burden. Regions should also consider whether retroactive application of Oil Capitol will cause a manifest injustice to the discriminatees in the case.[22] That issue is

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[19] See Jeffs Electric, LLC, slip op. at 8; Oil Capitol, 349 NLRB No. 118, slip op. at 2, 5.

[20] See Contractor Services, 351 NLRB No. 4, slip op. at 1, 4-6.

[21] Id., slip op. at 5.

[22] See, e.g., SNE Enterprises, 344 NLRB 673, 673 (2005) (although the Board customarily applies new policies and standards retroactively "to all pending cases in whatever

discussed below, along with instructions on how, where appropriate, to challenge retroactive application of Oil Capitol.

1. Determine if relevant issues have already been litigated in the merits proceeding

In all compliance cases involving salting discriminatees, Regions should evaluate the administrative record in the underlying unfair labor practice case to determine whether evidence exists to satisfy the General Counsel's Oil Capitol burden. If such record evidence exists and litigation becomes necessary, Regions should submit to Advice a proposed motion in limine that can be filed with the ALJ before the compliance proceeding in order to restrict re-litigation of issues that were already litigated and/or decided in the underlying unfair labor practice case.

When drafting a motion in limine, Regions should identify, to the extent possible, issues that were already decided by the Board and are thus precluded from further litigation. In addition, Regions should argue that if the ALJ concludes that relevant factual findings were made – even if an ultimate issue was not decided by the Board in the unfair labor practice hearing - the ALJ should at least take judicial notice of those findings and conclude that they assist the General Counsel in sustaining his Oil Capitol burden.[23]

If the ALJ thereafter denies the General Counsel's motion in limine, Regions should submit to Advice a draft motion and supporting brief requesting special permission from the Board to appeal the ALJ's ruling.

2. Evaluate whether retroactive application of Oil Capitol to a pending compliance case will cause a manifest injustice because of lost or unavailable evidence

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stage," in evaluating whether retroactive application of a new rule will cause manifest injustice, it will consider parties' reliance on preexisting law; the effect of retroactivity on accomplishment of the purposes of the Act; and any particular injustice arising from retroactive application). See also Pattern Makers (Michigan Model Mfrs.), 310 NLRB 929, 931 (1993).

[23] See the sample motion in limine for guidance (Attachment 1).

The Board stated in Oil Capitol that it would apply its new evidentiary rule in the decision itself and "all future" and/or "all" cases involving salting discriminatees.[24] Since Oil Capitol issued, the Board has directed its application to the relevant compliance issues in several salting cases. In several of those cases, the General Counsel is arguing that because of their age, retroactive application of Oil Capitol would cause a manifest injustice to the discriminatees.[25] For instance, we have filed Motions for Reconsideration in the following cases: Contractor Services, 351 NLRB No. 4 (September 27, 2007); Fluor Daniel, Inc., 351 NLRB No. 14 (September 28, 2007); Brown & Root Power & Mfg., 351 NLRB No. 20 (September 28, 2007); and McBurney Corp., 351 NLRB No. 49 (September 29, 2007).

We also filed with the Board a special appeal of the ALJ's decision to retroactively apply Oil Capitol to the compliance proceeding arising from Fluor Daniel, Inc., 333 NLRB 427 (2001), enfd. 332 F.3d 961 (6th Cir. 2003), reh. and reh. en banc denied (2004), cert. denied 543 U.S. 1089 (2005). Charging Party unions have filed their own motions in many of these cases and have also filed Motions for Reconsideration with the Board in the following cases: Bill's Electric, 350 NLRB No. 31 (July 24, 2007); BCE Construction, Inc., 350 NLRB No. 78 (August 31, 2007); and EPI Construction, 350 NLRB No. 81 (August 31, 2007).[26]

Regions should therefore evaluate whether reliable evidence presently exists to support the General Counsel's new burden if Oil Capitol is retroactively applied in the particular case. If so, Regions should proceed with their investigation and/or litigation of compliance issues under the new Oil Capitol burden of proof.

However, Regions should submit to Advice all cases in which the charging party claims, or the Region has independently determined, that evidence needed by the

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[24] See Oil Capitol, 349 NLRB No. 118, slip op. at 2, 6.

[25] In motions for reconsideration, some charging parties argued to the Board that a circuit court order enforcing an underlying Board decision precludes the Board from applying Oil Capitol in a subsequent compliance case. The General Counsel has not made this argument.

[26] The Charging Party union also filed with the Board a motion for reconsideration of the Oil Capitol decision itself. The Board denied the motion on November 15, 2007.

General Counsel to sustain that burden has been lost or is otherwise unavailable because of the passage of time and that, therefore, retroactive application of Oil Capitol will cause a manifest injustice to the discriminatees in the case.[27]

If the Region believes that retroactive application would result in manifest injustice, and if a motion for reconsideration pursuant to Section 102.48(d)(1) of the Board's Rules and Regulations of a Board decision in the case would be timely, Regions should submit to Advice a draft motion for reconsideration.[28] Alternatively, if a motion for reconsideration would not be timely,[29] or if the Region disagrees with the charging party's claim of

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[27] For instance, evidence may be "otherwise unavailable" because of the likelihood of lost evidence, faded memories, and unavailable witnesses due to the passage of time since the union's salting campaign and employer's unlawful conduct. "Unavailable evidence" also includes evidence not initially maintained or preserved because unions and discriminatees had no notice at the time of the salting campaign that they would need to produce it in the future. See, e.g., the model motion for reconsideration (Attachment 2).

[28] Such a Board decision could be either a decision on the underlying unfair labor practice case involving violations that are not recent (e.g., McBurney Corp., 351 NLRB No. 49 (September 29, 2007) (finding unfair labor practice liability for refusals to hire in 1995 and 1996 and directing that backpay be determined under Oil Capitol)), or a decision in a compliance proceeding on violations that are not recent (e.g., Fluor Daniel, Inc., 351 NLRB No. 14 (September 28, 2007) (remanding for reconsideration under Oil Capitol compliance case involving violations that occurred in 1990)).

A motion for reconsideration must be filed within 28 days of the Board decision. See Section 102.48(d)(2) of the Board's Rules and Regulations. Therefore, if a Region anticipates such a motion will be necessary, it should immediately request an extension of time and contact the Division of Advice.

[29] For example, a pending compliance case may be based on a Board unfair labor practice decision that issued before Oil Capitol.

manifest injustice or remains undecided as to the strength of the evidence supporting such claim, it should submit the case to Advice with a recommendation as to whether retroactive application of Oil Capitol would lead to a manifest injustice.[30] In either event, regardless of the procedural posture of the case, the analysis of the manifest injustice claim should track that described below and in the attached model pleading (Attachment 2).

In each case in which the General Counsel has argued manifest injustice, we evaluated the evidence and circumstances to determine whether a manifest injustice would result from retroactive application of Oil Capitol. A model pleading containing the various arguments the General Counsel has made to date, is attached (Attachment 2). As that pleading demonstrates, the main consideration for evaluating whether retroactive application of Oil Capitol would cause a manifest injustice to the discriminatees is the likelihood of lost evidence in the intervening years between the respondent's unlawful conduct and the Regions' investigation and litigation of compliance issues.

For example, as the model pleading demonstrates, where a respondent's unlawful conduct occurred over 17 years ago, the General Counsel argued that earlier reliance on the well-settled Dean General presumption of continued employment, and the unavailability of discriminatees as well as the inability of discriminatees and other witnesses to now recall events and produce documents from so long ago, would detrimentally impact its ability to effectively litigate compliance issues under the new Oil Capitol framework. It may also be appropriate to argue that further delay caused by retroactive application of Oil Capitol (i.e., additional compliance investigation and, in some instances, re-litigation) would also only further delay the Board from accomplishing the Act's purpose of remedying the respondents' unfair labor practices that had been committed many years ago.

In the unusual situation where an ALJ had already evaluated the backpay lengths of the discriminatees under Dean General, the Board's application of Oil Capitol to that case would require the Region, which relied upon Dean General, to conduct additional investigation and further litigation of compliance issues that were otherwise close to resolution. Finally, the General Counsel could argue that these detrimental effects of retroactive application

[30] Regions should also contact the Division of Advice if a charging party refuses to cooperate with the Region's request for evidence and/or investigation of a manifest injustice claim.

of Oil Capitol would result in undue harm to the discriminatees in those cases.

IV. Conclusion

Regions should use this memorandum as guidance when investigating compliance cases involving Oil Capitol and contact the Division of Advice and Contempt Litigation and Compliance Branch with specific questions.

Specifically, Regions should submit to Advice:

- Cases involving unresolved issues regarding whether a discriminatee is a salt;
- All cases where the charging party claims, or the Region independently determines, that application of Oil Capitol would result in manifest injustice. Such submissions may take the form of:
  - Draft motions in limine to be filed with ALJs to restrict re-litigation of issues litigated and/or decided in underlying unfair labor practice cases;
  - Draft motions and supporting briefs requesting special permission from the Board to appeal ALJs' denials of motions in limine;
  - Draft motions for reconsideration of Board decisions retroactively applying Oil Capitol to compliance cases in which Regions determine that a manifest injustice will result;
  - Standard Requests for Advice
    - if the Region determines that a manifest injustice will result but a motion for reconsideration would be untimely
    - if the Region disagrees with a charging party's claim of manifest injustice or remains undecided as to the strength of the evidence underlying such claim
    - if a charging party refuses to cooperate with the Region's request for evidence and/or investigation of a manifest injustice claim.

Regions should submit to CLCB:

- All cases involving a court-enforced reinstatement/instatement order where the respondent has not offered reinstatement/instatement

/s/
R.A.S.

Attachments 1 and 2

cc: NLRBU
Release to Public